

**AGENDA ITEM #**  
March 15, 2002

To: Delta Protection Commission

From: Margit Aramburu

Subject: SB 1653, California Bay-Delta Act (Senator Costa)  
*(For Commission Consideration and Possible Action)*

**STAFF RECOMMENDATION:**

Staff recommends the Commission consider the proposed language and earlier comment letter, and direct staff to prepare comments on the draft legislation.

**BACKGROUND:**

Senator Costa has drafted legislation that would create a new State agency--the California Bay-Delta Commission--to carry out the CALFED program.

Legislation to create a similar Commission was submitted by Senator Machado in the earlier session. The CALFED Committee and the Commission reviewed the earlier legislation and prepared comments (attached).

This legislation was received too late for review by the CALFED Committee.

**WHO WOULD MAKE DECISIONS?**

The issue of Board membership has not been addressed. The Delta Protection Commission's comments on previous legislation focused on membership of the Board.

The Executive Director of the Bay-Delta Commission would be appointed by the Governor.

## **WHAT WOULD THE BAY-DELTA COMMISSION DO?**

The goal of the legislation is to ease the implementation of the CALFED program by creating a new agency with fiscal, legal and administrative powers. The current program implementation has been hampered by lack of these powers. The new agency would:

- Receive funds from multiple sources.
- Enter into contracts.
- Disburse funds through grants, public assistance, loans, and contracts.
- Employ services of other public, nonprofit, or private entities.
- Employ staff, including legal staff.
- Adopt regulations.
- Acquire, own and manage interests in land, water or other real property from willing sellers.
- Obtain and hold regulatory permits and prepare environmental documents.
- Develop policies and make decisions at program milestones, and provide direction to ensure balanced implementation, integration, and continuous improvement in all program elements.
- Track progress of all program projects and activities and assess overall achievement of CALFED program goals and objectives.
- Modify program timelines and activities to ensure program meets its overall goals and objectives.
- Review and respond to legislative proposals and review and submit legislative proposals.
- Every December 15 prepare a report on the status of implementation of all elements of the program.
- Prepare State and federal budget proposals.
- Manage the ecosystem restoration program until another implementing agency is designated.
- Manage the science program.
- Coordinate and integrate with other related programs to reduce conflicts and inconsistencies with other program.
- Resolve conflicts or disputes.
- Seek out and promote partnerships with local interests and program.
- Develop a regulatory coordination and streamlining process that reduces or eliminates duplicative process or decisionmaking.
- Establish a public advisory committee.

## **HOW WOULD THE BAY-DELTA COMMISSION BE FUNDED?**

The Bay-Delta Commission would be funded by a combination of State and federal funds, including bond funds.

**ISSUES:**

- Will the Delta Protection Commission and other Delta interests be part of the Bay-Delta Commission?
- If not, how will the interests and concerns of the Commission and other agencies not on the Bay-Delta Commission participate in implementation of the CALFED program?
- Will the new Bay-Delta Commission adopt and implement all reports and plans prepared by CALFED to date, including Delta Implementation Plan and others?
- Will the new Bay-Delta Commission implement the mitigation measures included in the Programmatic EIR/EIS?

BILL NUMBER: SB 1653  
INTRODUCED BY: Senator Costa  
FEBRUARY 21, 2002

LEGISLATIVE COUNSEL'S DIGEST

Under existing law, certain state and federal agencies with management and regulatory responsibilities in the San Francisco Bay and Sacramento-San Joaquin Delta Estuary participate in the CALFED Bay-Delta Program for the purposes of improving ecosystem quality, water supply reliability, water quality, and the integrity of the levees and channels in the Bay-Delta.

This bill would enact the California Bay-Delta Act. The bill would establish in an unspecified agency the California Bay-Delta Commission, consisting of an unspecified membership, and would prescribe its organization, powers, and purposes.

The bill would require the commission and the implementing agencies, as defined, to carry out the programs, projects, and activities necessary to implement the Bay-Delta Program, defined to mean those projects, programs, commitments and other actions that address the goals and objectives of the CALFED Bay-Delta Program Record of Decision, dated August 28, 2000.

The bill would require the Governor to appoint a director, would prescribe the director's duties and powers, including, with the advice and consent of the commission, the appointment of a lead scientist. The bill would require the lead scientist to nominate, and the commission to confirm, an Independent Science Board that would review and advise the commission and advisory board.

The bill would require the commission to establish a public advisory committee.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS: SECTION 1. Division 26.5 (commencing with Section 79400) is added to the Water Code, to read:

DIVISION 26.5. CALIFORNIA BAY-DELTA ACT

CHAPTER 1. GENERAL PROVISIONS

79400. This act shall be known as the California Bay-Delta Act.

79401. The Legislature finds and declares all of the following:

a) The Bay-Delta estuary is the largest estuary on the West Coast of the United States. It includes over 738,000 acres in five counties. The tributaries, sloughs, and islands support over 750 plant and animal species.

(b) The Bay-Delta is critical to California's economy, supplying drinking water for two-thirds of Californians and irrigation water for over 7,000,000 acres of the most highly productive agricultural land in the world. It also supports 80 percent of the state's commercial salmon fisheries.

(c) The Bay-Delta is the hub of California's two largest water distribution systems--the Central Valley Project, operated by the United States Bureau of Reclamation and the State Water Project, operated by the California Department of Water Resources. It also provides conveyance of flood waters from most of the rivers in the Central Valley.

(d) Water diversions, the effects of increased population throughout California, exotic species, water pollution, and numerous other factors have had a serious impact in fish and wildlife in the Bay-Delta. The drought of 1987-92 demonstrated how vulnerable California is to water shortages. More recent conflicts between water quality, fish protection, and water supply demonstrate how little flexibility there is in the current system. Levees in the Bay-Delta are vulnerable to catastrophic failure that could disrupt the state's water supply.

79402. Unless the context otherwise requires, the following definitions set forth in this section govern the construction of this division:

(a) "Balance" or "balanced implementation" means implementation of projects, programs, or other actions in a manner that results in concurrent improvement in all program elements and in a manner that there is assurance that improvements in some program elements are not made without corresponding improvements in other program elements.

(b) "Bay-Delta" means the San Francisco Bay and Sacramento-San Joaquin Delta Estuary.

(c) The "California Bay-Delta Program" or "Bay-Delta Program" means those projects, programs, commitments, and other actions that address the goals and objectives of the CALFED Bay-Delta Program Record of Decision, dated August 28, 2000, as modified by this division.

(d) "Category A programs" mean those state and federal agency programs and funds that are to be managed and implemented consistent with the California Bay-Delta Program goals and objectives.

(e) "Commission" means the California Bay-Delta Commission.

(f) "Director" means the Director of the California Bay-Delta Commission.

(g) "Implementing agencies" means those agencies with the primary responsibilities for implementing the program elements, subject to Sections 79440 and 79441.

(h) "Program elements" means the 11 program elements of the California Bay-Delta Program as follows:

- (1) Levee system integrity.
- (2) Water quality.
- (3) Water supply reliability.
- (4) Ecosystem restoration.
- (5) Water use efficiency.
- (6) Water transfer.
- (7) Watershed.
- (8) Storage.
- (9) Conveyance.
- (10) Science.
- (11) Environmental Water Account.

(i) "Projects" means both programs and capital projects.

79403. A solution to these problems requires state, federal, and local action in numerous regions throughout the state, not only the Bay-Delta itself, but also its watershed and the areas that depend on water exported from the Bay-Delta.

(a) The California Bay-Delta Program is divided into the following five regions:

- (1) Sacramento and San Joaquin River Delta.
- (2) San Francisco Bay Watershed.
- (3) Sacramento Valley.
- (4) San Joaquin Valley.
- (5) Southern California.

(b) Nearly two dozen state and federal agencies have some role in managing or regulating the natural resources of the Bay-Delta and its watershed. A coordinated implementation structure and organization is necessary for effective implementation of the California Bay-Delta Program.

(c) The agencies participating in the California Bay-Delta Program have drafted a 30-year plan to coordinate existing programs and direct new programs to improve the quality, and reliability of the state's water supplies and restore the ecological health of the Bay-Delta watershed.

(d) To ensure efficiency, visibility, and accountability, the implementation of the California Bay-Delta Program requires the establishment of a commission. The commission is intended to accomplish the following:

- (1) Provide accountability to the Legislature, Congress, and interested parties for the program's performance.
- (2) Ensure that the program is implemented in a balanced manner.
- (3) Facilitate consistent monitoring, assessment, and reporting of the agencies' individual and cumulative actions.
- (4) Facilitate the use of sound, consistent science across all program elements.
- (5) Coordinate and, where appropriate, integrate existing and new government programs to meet common goals, avoid conflicts, and eliminate redundancy and waste.
- (6) Oversee coordinated implementation of the California Bay-Delta Program to ensure consistency with the goals and objectives of The CALFED Bay-Delta Program Record of Decision, dated August 28, 2000.

(e) Successful implementation of the California Bay-Delta Program will require the full cooperation and participation of many federal agencies. Federal laws may need to be enacted to authorize the level of federal agency participation envisioned by this division. Until the time as Congress enacts those federal laws, it is the intent of the Legislature that state agencies work cooperatively with federal agencies.

79403.(a) Nothing in this division shall be construed to restrict or override regulatory or adjudicatory authority or public trust responsibilities of any state or federal agency or to restrict or override authority or responsibility of state, federal or local water project operations under applicable law as those authorities and responsibilities were provided on December 31, 2002.

(b) Subdivision (a) shall not be interpreted to relieve the state agencies from the obligation to carry out their authorities and responsibilities in a manner that is consistent with the goal of the Bay-Delta Program to promote cooperative and coordinated actions and programs that result in balanced solutions to Bay-Delta problems.

(c) In carrying out their respective authorities and responsibilities the state agencies shall, whenever feasible, exercise their discretion

in a manner that promotes and supports balanced implementation of the Bay-Delta Program.

79404. This division shall be carried out in a manner consistent with respective state and federal agency budget development, review, and approval processes.

79405. The commission is an agency of the state. Nothing in this division shall be construed to waive the state's immunity to suit in federal court under the Eleventh Amendment to the United States Constitution.

79406. State agencies, including the commission, shall work with federal agencies and the Congress of the United States to obtain, as soon as reasonably feasible, the necessary federal approvals, including federal legislation, that will enable the federal agencies to participate as partners with the state in the governance of the Bay-Delta Program pursuant to this division.

## CHAPTER 2. CALIFORNIA BAY-DELTA COMMISSION

### Article 1. California Bay-Delta Commission

79410. There is hereby established in the \_\_\_\_ agency the California Bay-Delta Commission.

79411. Pursuant to Section 78684.8, the commission is hereby designated the successor to the Secretary of the Resources Agency for the purpose of carrying out the balancing and related procedures established pursuant to Section 78684.12.

79412. The members of the commission shall be as follows:\_\_\_\_

79413. The federal role on the commission is intended to facilitate coordination and advice from federal agencies and thereby assist the state and federal agencies more effectively meet their common goals and obligations. Nothing in this division is intended to extend federal law, including the National Environmental Policy Act, to actions by state agencies.

79414. The commission is subject to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code).

79415. a) Except as provided in subdivision (b), a public member of the commission shall hold office for a term of four years, and until his or her successor is appointed.

(b) In the case of the members initially appointed by the Governor, two members shall be appointed to serve until January 1, 2005, and two members until January 1, 2007.

(c) The Governor, in consultation with the United States Secretary of the Interior, shall appoint one of the commission members as a chairperson who shall preside at all meetings, and a vice-chairperson who shall preside in the absence of the chairperson.

(d) All actions approved by the commission shall require an affirmative vote of a majority of the commission members.

(e) The commission may form committees, and the committees may make recommendations to the full commission.

(f) Each public member of the commission shall receive compensation in the amount of one hundred dollars (\$100) per day, not to exceed eight hundred dollars (\$800) per month, for conducting any commission business authorized by the commission, upon the approval of the compensation by a majority of the commission members by a recorded vote. A public member may also receive reimbursement for the necessary expenses incurred by the member in the performance of the member's duties.

## Article 2. Commission Powers and Duties

79420. The commission may exercise all of the following powers:

- (a) Sue or be sued.
- (b) Delegate functions to committees or staff of the commission.
- (c) Request reports from state, federal, and local government agencies on issues related to the implementation of the California Bay-Delta Program.
- (d) Receive funds, including funds from private and local government sources, contributions from public and private sources, as well as state and federal appropriations.
- (e) Enter into contracts. The commission and the Department of General Services shall cooperate on procedures to delegate authority to the commission or commission officers, as appropriate, to execute contracts of up to one million dollars (\$1,000,000), and to maximize flexibility and efficiency in implementing commission activities.
- (f) Disburse funds through grants, public assistance, loans, and contracts to entities within the Bay-Delta Program regions, described in subdivision (a) of Section 79403, to carry out the Bay-Delta Program goals and objectives.
- (g) Employ the services of other public, nonprofit, or private entities.
- (h) Employ its own legal staff or contract with other state or federal agencies for legal services, or both. The commission may employ special, outside legal counsel with the approval of the Attorney General.
- (i) Adopt regulations as needed for implementation of this division.
- (j)(1) Acquire, own, and manage interests in land, water, or other real property if no other implementing agency is available.
- (2) Interests in land, water, or other real property shall be acquired from willing sellers by means of entering into voluntary agreements.
- (k) Obtain and hold regulatory permits and prepare environmental documents.

79421. The commission shall carry out the following duties:

- (a) Develop policies and make decisions at program milestones, and provide direction to ensure balanced implementation, integration, and continuous improvement in all program elements.
- (b) Track the progress of all program projects and activities and assess overall achievement of California Bay-Delta Program goals and objectives.
- (c) Modify, as needed, the California Bay-Delta Program's timelines and activities where the commission deems it necessary to ensure that the



program meets its overall goals and objectives. Modification shall be coordinated with implementing agencies and other affected agencies with public input.

(d) Communicate with the Congress of the United States and the Legislature on program progress, answer legislative inquiries, review and respond to legislative proposals, and review and submit legislative proposals.

(e) On or before November 15 of each year, review progress in implementing the program.

(f) On or before December 15 of each year, submit a report to the Governor, the United States Secretary of the Interior, the Legislature, and the Congress of the United States that describes the status of implementation of all elements of the program.

(g) If, at the conclusion of each annual review submitted under subdivision (f), or if a timely annual review has not been issued, the Governor or the United States Secretary of the Interior determines that either the program schedule or objectives has not been substantially adhered to, the Governor and the Secretary of the Interior, in coordination with the commission, shall prepare a revised schedule that ensures achievement of balanced progress in all program elements consistent with the intent of the California Bay-Delta Program and applicable regulatory requirements. Upon determination that the prior schedule has not been substantially adhered to, state funds, if the determination was made by the Governor, and federal funds, if the determination was made by the United States Secretary of the Interior, shall, to the extent authorized, be available for expenditure in the subsequent budget year only if a revised schedule has been developed within six months from the date on which the determination was made. Upon the submission of any revised schedule, funds shall be expended in accordance with that revised schedule.

(h) To support annual implementation, submit to the Governor an annual state proposed budget for each of the program elements and the commission's oversight and coordination duties, in accordance with the annual budget process.

(i) Coordinate with federal agencies to develop a proposed federal budget to support the California Bay-Delta Program that the federal agencies can submit to the President of the United States in accordance with the federal budget process.

(j) Manage the ecosystem restoration program element until another implementing agency is designated by the Legislature.

(k) Manage the science program element.

(l) Coordinate, and when appropriate, integrate the Bay-Delta Program with other related programs to maximize available resources and reduce conflicts and inconsistencies with other programs.

(m) Resolve conflicts or disputes relating to the program.

(n) Seek out and promote partnerships with local interests and programs that seek integrate various water management options, and cooperate and undertake joint activities with other persons, including local entities, Indian tribes, water users, and landowners. These activities shall include, but are not limited to, planning, design, technical assistance, construction projects, and development of an independent science program.

(o) Develop, in cooperation with federal agencies, a regulatory coordination and streamlining process for the issuance of permits and approvals required under state and federal law that reduces or eliminates duplicative process or decisionmaking.

79422. By December 15, 2003, develop a pilot program in coordination with the Department of Personnel Administration, the State Personnel Board, the Department of General Services, the Department of Finance, the Department of Information Technology, and the Governor's Office for Innovation in Government to develop and implement actions that are intended to increase the administrative efficiency of the commission, including but not limited to, budgeting, contracting, purchasing, and personnel management.

79423. (a) Implementing agencies shall annually submit to the director their annual program plan and budget setting forth how each implementing agency proposes to implement their respective program elements in the following year.

(b) Each annual program plan shall include programs that are designated as Category A programs in the CALFED Implementation Memorandum of Understanding, an attachment to the August 28, 2000, Record of Decision described in subdivision (c) of Section 79402.

(c) Annually, the commission, in consultation with the implementing agencies and the advisory committee, shall determine those amendments that shall be made to the list of Category A programs.

(d) Each annual program plan shall include program priorities, work plans, proposed budgets, and significant program products, including, but not limited to, regulations, grant or loan solicitations, environmental documentations, and project selection.

(e) Annual programs plans shall also include a strategy and budget for addressing program-specific, critical scientific uncertainties, developing and implementing performance measures, evaluating program actions, and conducting scientific review of program implementation and proposed projects. The implementing agency and the director shall consult with the lead scientist to determine an appropriate science strategy and budget.

(f) Implementing agencies shall coordinate the preparation of annual program plans with agencies participating in the California Bay-Delta Program and other appropriate agencies.

(g) The implementing agencies and the director shall integrate the annual plans for the program elements into a comprehensive and balanced annual implementation plan.

(h) The commission shall review, approve, and, as necessary, direct implementing agencies to modify annual program plans and projected expenditures on Category A's program to ensure consistency with the program and balanced achievement of the program's goals and objectives.

### Article 3. LIMITATIONS ON COMMISSION POWERS AND DUTIES

79430. The commission shall comply with state water laws.

79431. The commission does not have the authority to levy taxes, user fees, or assessments without explicit legislative approval.

79432. The commission shall exercise its powers consistent with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code). Nothing in this division shall prevent the modification or supplementation of the CALFED Final Programmatic Environmental Impact Statement/Environmental Impact Report, certified August 28, 2000, or define the manner in which that document may be used.

79440. (a) The commission and the implementing agencies shall carry out the programs, projects, and activities necessary to implement the Bay-Delta Program. The commission shall coordinate the activities of the implementing agencies to ensure balanced implementation that meets the goals and objectives of the Bay-Delta Program.

(b) "Implementing agency" includes those state agencies listed in Section 79441 until the United States has, through statute or otherwise, authorized the listed federal agencies to participate in the governance and implementation of the Bay-Delta Program in the manner set forth in this division. Until that federal authorization has been provided, the state implementing agencies shall consult, cooperate, and coordinate with federal agencies in all matters related to implementation of the program.

79441. (a) The Department of Water Resources, the Department of Fish and Game, and the Army Corps of Engineers are the implementing agencies for the levee program element.

(b) The State Department of Health Services, the State Water Resources Control Board, and the United States Environmental Protection Agency are the implementing agencies for the water quality program.

(c) The commission, the Department of Fish and Game, the United States Fish and Wildlife Service, and the National Marine Fisheries Service, shall be the implementing agencies for the ecosystem restoration program.

(d) The Department of Water Resources and the United States Bureau of Reclamation are the implementing agencies for the water supply reliability, water use efficiency, storage, and conveyance elements of the program.

(e) The Department of Water Resources, the State Water Resources Control Board, and the Bureau of Reclamation are the implementing agencies for the water transfer element.

(f) The commission, the Resources Agency, the State Water Resources Control Board, the Department of Water Resources, the Department of Fish and Game, the Natural Resources Conservation Service, the United States Environmental Protection Agency, and the United States Fish and Wildlife Service, are the implementing agencies for the watershed program element.

(g) The commission is the implementing agency for the science program element.

(h) The commission, in consultation with the Department of Water Resources, the Department of Fish and Game, the Bureau of Reclamation, the United States Fish and Wildlife Service, and the National Marine Fisheries Service, are the implementing agencies for the environmental water account.

(i) The commission, by June 1, 2004, and after consultation with all affected agencies and the advisory committee, shall submit a report to the Legislature setting forth the commission's recommendation as to whether another appropriate implementing entity should be designated for the ecosystem restoration program.

#### Article 5. Bay-Delta Commission Staff

79450. The Governor shall appoint, in accordance with Section 12001 of the Government Code, a director, in consultation with the United States Secretary of the Interior, who shall serve at the pleasure of the Governor.

79451. The director shall administer the affairs of the commission as directed by the commission and shall direct the staff of the commission. The annual salary of the director shall be as provided by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 3 of the Government Code.

79452. (a) The director, with the advice and consent of the commission, shall appoint a lead scientist. The lead scientist shall report to the commission. The lead scientist in cooperation with the implementing agencies, shall be responsible for the development and implementation of the California Bay-Delta Science Program.

(b) For all program elements, the lead scientist shall assure scientific application of adaptive management, monitoring, and investigations to reduce uncertainties, and full investigation of the effects of each program element on other program elements.

(c) The lead scientist shall ensure that peer review is employed extensively and prudently to assure the quality of program planning, implementation, and evaluation.

(d) The purpose of the science program element shall be to carry out all of the following functions:

- (1) Provide implementing agencies and the commission, authoritative and unbiased reviews of the state of scientific knowledge relevant to management and decisionmaking for the California Bay-Delta Program.
- (2) Implement strategies to articulate, test, refine and improve scientific understandings.
- (3) Provide a comprehensive framework to integrate, monitor, and evaluate the use of adaptive management and the best available scientific understandings and practices for implementation of the California Bay-Delta Program.
- (4) Independently review the technical and scientific performance of the California Bay-Delta Program including, but not limited to, the following:
  - (A) Conclusions.
  - (B) Studies.
  - (C) Studies, monitoring, performance measures.
  - (D) Data analyses.
  - (E) Scientific practices that form the scientific bases for program decisionmaking.

79453. The director may appoint and hire staff as necessary to administer the affairs of the commission at a salary and classification level commensurate with other state and federal agencies.

79454. The director shall organize commission staff in a manner best suited to administer the affairs of commission and oversee a complex multiagency program.

79455. The director may fill commission staff positions with state employees hired by the commission, federal employees assigned to the program by cooperating federal agencies, or with staff from other state public entities. Due to the commission's unique multijurisdictional oversight responsibilities, the commission is exempt from standard state civil service allocation standards and shall retain all state civil service positions without regard to whether that position was vacant continuously for six consecutive monthly pay periods.

79456. Notwithstanding Section 19818.10 of the Government Code, and in cooperation with the State Personnel Board, the commission shall establish personnel classifications, including a new management level classification, specific to the commission's unique role in oversight and coordination.

#### Article 6. Advisory Committee

79460. (a) The commission shall establish a public advisory committee.  
(b) The commission may recognize an advisory committee that is functioning as an advisory committee on January 1, 2002, as the advisory committee required by this section.

(c) The commission may permit the advisory committee to be structured and appointed to comply with the Federal Advisory Committee Act (Public Law 92-463, as amended).

(d) The Commission shall ensure that the advisory committee is comprised of persons who provide geographic balance and broad range of interests and perspectives, including agricultural water, urban water, environmental, tribal, environmental justice, business, labor, and city, and county and local government representatives.

(e) The advisory committee shall review and make recommendations to the commission and director on issues related to implementation of the California Bay-Delta Program and annual progress reports.

(f) The advisory committee members may receive reimbursement for necessary travel expenses incurred by the members in the performance of the members duties, consistent with state per diem rates.

#### Article 7. Independent Science Board

79470. (a) The lead scientist shall nominate, and the commission shall confirm, a board of independent scientists, to be known as the Independent Science Board, that shall review and advise the commission and the advisory committee, as appropriate, on the science relative to implementation of all program elements.

(b) The commission may recognize an existing board of independent scientists as members of the board required by this section.

(c) The commission shall respond to advice and reviews prepared by the Independent Science Board.

79471. The lead scientist may establish, in cooperation with implementing agencies, additional independent science panels to assist implementing agencies and the commission in reviewing and advising on scientific issues associated with individual program elements, reviewing multiple program actions within specific geographic areas, and defining the state of knowledge relative to specific scientific issues. Members of these panels may also be members of the Independent Science Board.